UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

SUSAN D. LUNDBORG,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 94-384-P-C***
	)	
PHOENIX LEASING, INC., et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON
DEFENDANTS' MOTIONS TO DISMISS, TO STRIKE,
SEEKING A MORE DEFINITE STATEMENT AND TO CHANGE VENUE

The plaintiff brings this action to press her contention that defendant Phoenix Leasing, Inc. ("Phoenix Leasing") and others committed fraud and violated California's usury laws by failing to disclose that an $850,000 loan to the plaintiff's cable TV business was not made by Phoenix Leasing but by two limited partnerships affiliated with it. The complaint[1] contains claims for civil perjury, abuse of process, common law conversion, common law fraud, breach of the duty of good faith under California law, interference with economic opportunity, violation of California usury law, unjust enrichment and violation of the federal Racketeer Influenced and Corrupt Organizations ("RICO") statute, 18 U.S.C. § 1961 et *seq*. Pending are Phoenix Leasing's motion to dismiss

[1] The plaintiff has moved pursuant to Fed. R. Civ. P. 15(a) for leave to amend her complaint. The rule provides that a party may amend an initial pleading once as a matter of course at any time before a responsive pleading is served. A motion to dismiss is not a responsive pleading for purposes of Rule 15(a). *See Walgren v. Howes*, 482 F.2d 95, 96-97 n.1 (1st Cir. 1973); 6 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1483 (1990) at 585. The plaintiff's motion for leave to amend the complaint is accordingly granted. I therefore treat all pending motions as applicable to the amended complaint, and refer to the amended complaint simply as the "complaint."

(Docket No. 6), its motion for a more definite statement and/or to strike certain allegations in the complaint (Docket No. 8) and its motion to change venue (Docket No. 9). The two individually-named defendants have filed separate motions seeking the same relief (Docket Nos. 18, 19 and 20) as well as motions to dismiss for lack of personal jurisdiction (Docket Nos. 14 and 16). I conclude that the movants are entitled to dismissal of the complaint as against them for the reasons set forth below.

I. Standard for Reviewing Motion to Dismiss

Two of the pending motions to dismiss invoke Fed. R. Civ. P. 12(b)(6), providing for dismissal for failure to state a claim upon which relief can be granted. "When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending plaintiff every reasonable inference in his favor." *Pihl v. Massachusetts Dept. of Educ*., 9 F.3d 184, 187 (1st Cir. 1993). The defendants are entitled to dismissal for failure to state a claim "only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory." *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990); *see also Jackson v. Faber*, 834 F. Supp. 471, 473 (D. Me. 1993).

With the plaintiff's consent, the court previously granted the request of Phoenix Leasing to take judicial notice of certain pleadings and orders of state courts in New York and Maine, and of the U.S. District Court for the District of Nevada ("Nevada District Court"), the U.S. District Court for the District of New Hampshire and the U.S. Bankruptcy Court for the District of Maine. Subsequent to the filing by Phoenix Leasing of its motion to dismiss the complaint, the Nevada District Court entered a final judgment; now pending is Phoenix Leasing's request for judicial notice

of that judgment (Docket No. 44). The plaintiff objects to this request (Docket No. 45), seeks to strike Phoenix Leasing's reply to its objection (Docket No. 48), and separately asks the court to take judicial notice of a memorandum filed by Phoenix Leasing in the Nevada District Court action (Docket No. 46). I grant the pending requests for judicial notice and deny the plaintiff's motion to strike. Since the authenticity of the documents of which the court takes judicial notice is not in dispute, the court may properly take them into consideration in connection with the motions to dismiss. *See Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993).

II. The Plaintiff's Allegations

Accepting the allegations in the complaint as true for purposes of the 12(b)(6) motions to dismiss, the relevant facts as asserted by the plaintiff may be summarized as follows. The plaintiff is a resident of Florida who, in 1988, was the sole shareholder in Community Cable Services of Maine, Inc. In 1988, Community Cable Services became a general partner in a Maine partnership known as Merlin Cable Partners ("Merlin Cable"). At all times relevant to this litigation, Merlin Cable maintained its offices in Saco, Maine. Prior to the sale of substantially all of its assets in 1993, Merlin Cable was engaged in the business of operating cable TV systems in 14 Maine towns. In August 1991 Merlin Cable filed a Chapter 11 bankruptcy petition; the U.S. Bankruptcy Court for the District of Maine appointed a trustee and in 1994 authorized the assignment to the plaintiff of all claims held by Merlin Cable against defendant Phoenix Leasing. The plaintiff was the guarantor of certain loans made by one or more of the defendants to Merlin Cable. She appears here in her personal capacity and as successor-in-interest to Merlin Cable and Community Cable Systems.

Phoenix Leasing is a California corporation with its principal place of business in San Raphael, California. It is licensed as a personal property broker pursuant to Cal. Civil Code § 22000 *et seq*. and is thus authorized to lend money at rates that would otherwise be violative of California's usury statute and state constitution.[2] Defendants Phoenix Leasing Cash Distribution Fund III and Phoenix Leasing Income Fund 1975 ALP (hereinafter referred to collectively as "the limited partnerships") are California limited partnerships that maintain their principal places of business at the offices of Phoenix Leasing in San Raphael.[3] Phoenix Leasing is a general partner of both of the limited partnerships. Defendant Gus Constantin is a resident of California and is chairman and chief executive officer of Phoenix Leasing and a general partner in Phoenix Leasing Income Fund 1975 ALP. He is the sole shareholder of Phoenix American, Inc., which in turn is the sole shareholder of

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[2] California's usury statute generally prohibits transactions in which the interest rate exceeds 12 percent annually. *See* Cal. Civil Code § 1916-1. The California Constitution imposes additional restrictions that apparently supersede those set forth in section 1916-1. *See* Cal. Const., Art. XV § 1(2). However, an entity that is a "personal property broker" pursuant to California law is apparently exempt from these limitations and may charge any interest rate for commercial loans in excess of $2,500. *See* Cal. Fin. Code § 22451. The relevant statute defines "personal property broker" as any entity

> engaged in the business of lending money and taking in the name of the lender, or in any other name, in whole or in part, as security for such loan, any contract or obligation involving the forfeiture of rights in or to personal property, the use and possession of which property is retained by other than the mortgagee or lender, or any lien on, assignment of, or power of attorney relative to wages, salary, earnings, income or commission.

Id. at § 22009.

[3] Both of these defendants are added parties by virtue of the allowance of the amended complaint. As a consequence, neither has yet been served and neither has appeared. The original complaint lists "Phoenix Leasing Income Fund" as a party defendant, but there is no record of service on such a party.

Phoenix Leasing. Defendant Gary Martinez is a California resident who is vice-president of Phoenix Leasing.

Some time after its formation in 1988, Merlin Cable obtained franchises to construct and operate two cable-TV systems, one in northern Maine and the other in eastern Maine. Estimating the cost of these projects to be $1,000,000, Merlin Cable planned to borrow $850,000 to finance this activity. Phoenix Leasing agreed to loan Merlin Cable the requested sum at an interest rate of 1.5 percent per month, or 18 percent annually. The agreement also required Merlin Cable to pay Phoenix Leasing 25 percent of the value of the financed projects, up to $150,000, plus an additional $50,000 for each year the loan was outstanding after 1990. Securing the loan was Lundborg's pledge of $100,000 in cash, her personal guarantee as well as that of her business partner, a mortgage lien on her home in Suffolk County, New York, a pledge of all the shares in Merlin Cable held by its general partners, and a first lien on all assets of Merlin Cable subordinated only to certain future loans if made to Merlin Cable by a financial institution. The loan agreement gave Phoenix Leasing the right to take over the financed cable-TV systems in the event of Merlin Cable's default. Phoenix Leasing also took an option to purchase the cable-TV systems at either $1,500 per subscriber or 12 times the annualized cash flow of the systems (whichever was greater), less any outstanding loan balance. Closing took place on January 6, 1989 and the funds were disbursed to Merlin Cable thereafter. California law governs the loan agreement.

The loan has never been an asset of Phoenix Leasing. Instead, the loan was funded entirely by the two limited partnerships and Phoenix Leasing acted as their agent. Prior to February 28, 1994 Phoenix Leasing did not disclose to Merlin Cable or to anyone else involved in the loan transaction that Phoenix Leasing was acting as an agent for the limited partnerships, which were not licensed

as personal property brokers under California law. Acting under the direction and control of Constantin and with the knowledge of Martinez, Phoenix Leasing intentionally concealed this fact from Merlin Cable. It was disclosed to Merlin Cable by Martinez at a deposition conducted on February 28, 1994.

In April 1991, Phoenix Leasing commenced a foreclosure action in the Maine Superior Court against Merlin Cable and others. The complaint alleged that Merlin Cable defaulted on its obligations to Phoenix Leasing, but intentionally omitted the fact that Phoenix Leasing was not the owner of the loan. As a result of Merlin Cable's bankruptcy filing, it was stricken as a defendant in the Superior Court action. Thereafter, the state court entered summary judgment against Community Cable Services and in favor of Phoenix Leasing. Phoenix Leasing also obtained a judgment against Lundborg in 1992 in a state court action filed in Suffolk County, New York foreclosing on her home. In that action, Phoenix held itself out as the owner of the loan and holder of Merlin Cable's note.

Acting with the knowledge of the limited partnerships, Phoenix Leasing filed a proof of claim in the Maine bankruptcy court alleging that it was a secured creditor of Merlin Cable and was owed $1,136,151.51. Neither Phoenix Leasing nor the limited partnerships disclosed to the bankruptcy court that the limited partnerships were the actual holders of the Merlin Cable note. The bankruptcy court subsequently authorized settlement of this claim by payment of $400,000 in cash to Phoenix Leasing and assignment to Phoenix Leasing of a promissory note acquired by Merlin Cable in connection with the sale of its assets.

The efforts by Phoenix Leasing to enforce Merlin Cable's loan obligations led directly to Merlin Cable's bankruptcy filing. The subsequent asset sale arranged by the bankruptcy trustee took place at less than market value, resulting in losses to Merlin Cable of more than $1,000,000. As a

result of the New York foreclosure, the loss of her collateral and expenses, the plaintiff has suffered damages in excess of $1,600,000.

III. The Motions to Strike

Phoenix Leasing, Constantin and Martinez move pursuant to Fed. R. Civ. P. 12(e) for a more definite statement of the plaintiff's claims and also seek pursuant to Rule 12(f) to strike certain allegations in the complaint as irrelevant and scandalous. The two motions, one by Phoenix Leasing and the other jointly filed by Constantin and Martinez, are themselves not a model of clarity as to which allegations they wish to be stricken and which they wish to have stated more definitely. Both motions allege that the plaintiff has failed to plead fraud with particularity as required by Fed. R. Civ. P. 9(b), and each notes this contention is relevant to both the fraud and RICO claims. The Phoenix Leasing motion appears to raise this issue only in connection with its motion for a more definite statement, but Constantin and Martinez style their argument on this issue as one seeking relief pursuant to Rule 12(e) "and/or" Rule 12(f). *See* Motion for More Definite Statement or to Strike (Docket No. 20) of defendants Constantin and Martinez at 4.

Striking a portion of a pleading is a "drastic remedy" that is generally viewed with disfavor. 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1380 (1990) ("Wright & Miller") at 647; *see also Coolidge v. Judith Gap Lumber Co.*, 808 F. Supp. 889, 893 (D. Me. 1992) (discussing Rule 12(f) motion to strike defenses). Although a plaintiff may use Rule 12(f) to strike an insufficient defense, it is not appropriate for a plaintiff to use a motion to strike as a means to gain the dismissal of all or part of a complaint. 5A Wright and Miller, § 1380 at 644. However, "the technical name given to a motion challenging a pleading is of little importance inasmuch as prejudice

hardly can result from treating a motion that has been inaccurately denominated a motion to strike as a motion to dismiss the complaint." *Id*. at 644-46; *see also Dorman v. Emerson Elec. Co*., 23 F.3d 1354, 1357 n.2 (8th Cir.), *cert. denied*, 130 L. Ed. 2d 341 (1994). I will therefore assume that Constantin and Martinez invoke the particularity requirement to seek dismissal of the common-law fraud and RICO claims against them.

It is well established in this circuit that the heightened pleading requirement applies in cases alleging fraud pursuant to RICO. *Feinstein v. Resolution Trust Corp*., 942 F.2d 34, 42 (1st Cir. 1991). "As in any other fraud case, the pleader is required to go beyond a showing of fraud and state the time, place and content of the alleged . . . communications perpetrating that fraud." *Id*. (citation and internal quotation marks omitted); *see also New England Data Servs., Inc. v. Becher*, 829 F.2d 286, 289 (1st Cir. 1987).

I conclude that the allegations relevant to the RICO claims are not stated with sufficient particularity insofar as they seek to allege fraud by Constantin and Martinez.[4] Indeed, the references in the complaint to these two defendants are both sparse and vague, *viz*:

> Phoenix [Leasing's] unlawful and criminal scheme to defraud Merlin Cable by entering into a usurious loan arrangement in behalf of the [limited partnerships] and others was, upon information and belief, conceived, implemented and carried out under the direction and control of Defendant Constantin.

Complaint ¶ 39.

> Acting pursuant to the directions of Constantin and Phoenix [Leasing], Defendant Martinez negotiated the terms and conditions of some or all of the aforesaid unlawful and criminal loan transactions and, upon information and belief, Mr. Martinez implemented the closing of the loan transactions, paid out borrowed funds with

[4] Because I conclude, *infra*, that the court lacks personal jurisdiction over Constantin and Martinez in the absence of the RICO claim, I do not reach their contention that the complaint fails to allege common-law fraud with the requisite particularity.

> actual knowledge that Phoenix was the lender and with knowledge that usurious loans were being made under false and fraudulent pretenses by an unlicensed entity.

Id. ¶ 41.

> Judgment was obtained by Phoenix [Leasing] in the [Maine state court] Action on the basis of . . . an affidavit by Gary Martinez stating that he is the custodian of Phoenix'[s] books and records and falsely swearing that such records evidence the claim as due and payable to Phoenix.

Id. ¶ 46.

> Constantin and Martin aided, abetted and conspired with Phoenix [Leasing] to carry out its scheme to obtain the assets of Merlin Cable and Lundborg in a criminal manner by means of fraudulent representations and omissions as set forth above.

Id. ¶ 81.

> Constantin is a person employed by and associated with Phoenix [Leasing] and, upon information and belief, with the actual moneylenders, including the [limited partnerships], involved in the pattern of racketeering activities by use of the U.S. Mail and wire communications in interstate commerce. Constantin is a general partner of Phoenix Leasing Income Fund 1975 ALP. Constantin directs and controls the affairs of Phoenix [Leasing] and the [limited partnerships] and, as such, was a participant in the affairs of Phoenix and the [limited partnerships] through a pattern of racketeering activities by causing Phoenix and the [limited partnerships] to make unlawful loans, to collect unlawful loans and by causing Phoenix [Leasing] and the [limited partnerships] to file false claims in a bankruptcy proceeding.

Id. ¶ 111.

> Martinez is a person employed by and associated with Phoenix [Leasing]. Martinez aided, abetted and participated in the racketeering activities of Phoenix [Leasing] and the [limited partnerships] by filing false claims in a bankruptcy proceeding, committing perjury and attempting to collect an unlawful debt by means of the U.S. Mail and wire communications in interstate commerce.

Id. ¶ 112.

> Constantin and Martinez traveled in interstate commerce and used the facilities of interstate commerce to promote and carry out an unlawful activity in violation of 18 U.S.C. § 1952. . . . Phoenix [Leasing], the [limited partnerships], Constantin and Martinez acted individually as principals and/or assisted, aided and abetted one another in a conspiracy to engage in a pattern of racketeering activities.

Id. ¶ ¶ 113-114. Of these allegations, the only one that is not entirely conclusory is the one alleging that Martinez executed a false affidavit that enabled Phoenix Leasing to obtain a favorable judgment in Maine state court. Such conduct does not, by itself, fall within the definition of "racketeering activity" set forth in 18 U.S.C. § 1961(1); to establish RICO liability a plaintiff must demonstrate a pattern of racketeering activity with a showing of at least two such predicate acts within a specified time period. *See Feinstein*, 942 F.2d at 42; 18 U.S.C. § 1961(5). The plaintiff's RICO count relies on allegations that the defendants engaged in mail, wire and bankruptcy fraud -- wrongs that qualify as predicate acts under section 1961(1). Absent from the complaint are any allegations as to the time, place or content of the communications through which Constantin or Martinez committed predicate acts of fraud.

The First Circuit, in both *Feinstein* and *Becher*, was careful to temper its application of Rule 9(b) in the RICO context by pointing out that in certain circumstances a plaintiff submitting an insufficiently pleaded RICO complaint should be given an opportunity to conduct discovery and submit an amended complaint. *See Feinstein*, 942 F.2d at 43, citing *Becher*, 829 F.2d at 290. This is so in light of "the apparent difficulties in specifically pleading mail and wire fraud as predicate acts." *Id*. at 290. "[W]here the plaintiff was not directly involved in the alleged transaction[s], the burden on the plaintiff to know exactly when the defendants called each other or corresponded with each other, and the contents thereof, is not realistic." *Id*. at 291. Thus, because the plaintiff in *Becher*

> provided an outline of the general scheme to defraud and established an inference that the mail or wires was used to transact this scheme[,] requiring the plaintiff to plead the time, place and contents of communications between the defendants, without allowing some discovery, in addition to interrogatories, seems unreasonable.

Id. (citations omitted).

The present case is distinguishable from *Becher*, in which the plaintiff had not participated directly in the securities transactions that formed the basis of the RICO claim. The First Circuit also noted that one of the *Becher* defendants was incorporated in a state different from that in which other defendants resided, thus making it "difficult to perceive how the defendants would have communicated without the use of mail or interstate wires." *Id*. (citation omitted). Here, the plaintiff and/or entities that she controlled participated directly in the loan transaction that is at the heart of the matter, and all of the defendants are based at the same California office, thus attenuating the possibility that the defendants used the mails or interstate wires to accomplish nefarious ends. The plaintiff also participated directly in the bankruptcy proceedings in connection with which the defendants allegedly committed fraud. It therefore cannot be said that the facts relating to the RICO claim are "peculiarly within the defendants' control," thus warranting a determination that dismissal is premature pending further discovery and subsequent amendment of the complaint. *See id*. at 292. Indeed, unlike in *Becher*, here the plaintiff has already amended her complaint, in part as a response to information received as a result of discovery that has taken place notwithstanding the pendency of dismissal motions, and after she had been put on notice via the motions to strike that the sufficiency of her RICO allegations was at issue.

"Although *Becher* may in certain circumstances give a plaintiff a second bite at the apple, its generous formulation is not automatically bestowed on every litigant." *Feinstein*, 942 F.2d at 44. Absent a request by the plaintiff to conduct further discovery for the limited purpose of gaining details of the alleged predicate acts, "[i]n a RICO action where fraud has not been pleaded against a given respondent with the requisite specificity and Rule 9(b) has been flouted, dismissal should follow as to that respondent." *Id., see also United Transp. Union v. Springfield Terminal Co.*, 869

F. Supp. 42, 49 (D. Me. 1994) (additional discovery unnecessary "when it does not appear that a lack of specific information was the basis for the inadequate pleading"). Such a result is the appropriate one here as to Constantin and Martinez.

IV. Personal Jurisdiction over Defendants Constantin and Martinez

In the absence of the RICO claims against them, I further agree with Constantin and Martinez that they are entitled to dismissal of the complaint as against them for lack of personal jurisdiction. RICO includes a provision for nationwide service of process, and thus the court would have personal jurisdiction over Constantin and Martinez for purposes of RICO.[5] *See Bridge v. Invest America, Inc.*, 748 F. Supp. 948, 951 (D.R.I. 1990); 18 U.S.C. § 1965(d). Once the RICO claim has dropped out of the equation, no other basis for exercising in personam jurisdiction over the individually named defendants exists.

Two routes to the exercise of personal jurisdiction by a federal court exist: general jurisdiction, premised on a defendant's forum-based conducts being continuous and systematic even if unrelated to the case at bar, and specific jurisdiction, where the focus narrows to an examination of the activities at issue in the litigation. *Foster-Miller, Inc. v. Babcock & Wilcox Canada*, 46 F.3d 138, 144 (1st Cir. 1995). The plaintiff, who bears the burden of establishing in personam jurisdiction, *id*. at 145, relies exclusively on the existence of specific personal jurisdiction over

[5] In contending that the court lacks jurisdiction over them even as to the RICO claims, Constantin and Martinez rely on *Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535 (9th Cir. 1986). This reliance is misplaced. The Ninth Circuit based its holding on 18 U.S.C. § 1965(b), which permits a court in a RICO case to exert personal jurisdiction over all defendants when exercising its authority in such a case to waive venue requirements. *See Bridge v. Invest America, Inc.*, 748 F. Supp. 948, 951-52 (D.R.I. 1990). Section 1965(d) is the provision applicable when, as here, the issue of venue has not been raised.

Constantin and Martinez. In such a case, the outcome depends on the long-arm statute of the forum and on the limits imposed by the Constitution. *Id*. Maine's long-arm statute extends personal jurisdiction to the limit permitted by the Due Process Clause of the Fourteenth Amendment. *Archibald v. Archibald,* 826 F. Supp. 26, 29 (D. Me. 1993). The constitutional inquiry involves three steps:

> First, the claim underlying the litigation must directly arise out of, or relate to, the defendant's forum-state activities. Second, the defendant's in-state contacts must represent a purposeful availment of the privilege of conducting activities in the forum state, thereby invoking the benefits and protections of that state's laws and making the defendant's involuntary presence before the state's courts foreseeable. Third, the exercise of jurisdiction must . . . be reasonable.

United Elec., Radio & Mach. Workers of Am. v. 163 Pleasant St. Corp., 960 F.2d 1080, 1089 (1st Cir. 1992).

Both Constantin and Martinez contend that they, as distinct from Phoenix Leasing, engaged in no activities within the forum that could vest a Maine court with jurisdiction over them. They rely on *Calder v. Jones*, 465 U.S. 783 (1984), in which the Supreme Court noted that defendants' contacts with the forum "are not to be judged according to their employer's activities there." *Id*. at 790. However, the Court went on in *Calder* to stress that the defendants' status as employees of a tortfeasor did not somehow insulate them from jurisdiction, and employees who are "primary participants in an alleged wrongdoing intentionally directed at a [forum] resident" are subject to the jurisdiction of the forum's courts. *Id*. The alleged wrong in *Calder* was the publication in Florida of a libelous newspaper article that the employees knew would reach the forum state of California, the subject of which was the plaintiff's activities in California. *Id*. at 788-89. Here, even though neither Constantin nor Martinez was ever physically present in Maine at any time relevant to the

jurisdictional determination, their alleged actions in California were "expressly aimed" at Maine, *see id*. at 789, where both the cable-TV systems at issue and the debtor were located.

Martinez argues that he is not subject to in personam jurisdiction because he had no contact with the Maine borrower and because his activities in connection with the loan to Merlin Cable were limited to administering the contract between the borrower and Phoenix Leasing. This is unpersuasive. What Martinez characterizes self-servingly as mere acts of administration are what the plaintiff views as the wrong at the heart of this case: the process, wholly apart from contacts with Merlin Cable, of making it appear that Phoenix Leasing was the lender when, in fact, the funds came from the limited partnerships.

Similarly, Constantin contends that he was not involved in the negotiations with Merlin Cable over the loan in question. He asserts that has never directed any of his activities toward any residents of Maine, pointing out that the plaintiff is a resident of Florida. Again, the flaw in this argument is that the plaintiff's allegations do not center on the negotiations that led up to the loan transaction, but rather at events that took place in California and which the plaintiff contends were directed at Maine.

Nevertheless, I agree with these defendants that the plaintiff has failed to carry her burden of proof in establishing the existence of in personam jurisdiction over them. Specifically, the plaintiff must make a prima facie showing of personal jurisdiction; in so doing, the plaintiff may not rely on unsupported allegations in her pleadings. *See Boit v. Gar-Tec Prods., Inc.*, 967 F.2d 671, 675 (1st Cir. 1992). The plaintiff is "obliged to adduce evidence of specific facts," which the court accepts as true if properly supported. *Foster-Miller*, 46 F.3d at 145. In some circumstances, it may be appropriate for the court to require more than a prima facie showing before demanding that an

out-of-state defendant submit to the court's jurisdiction, or the court may steer a middle course by deferring the jurisdictional determination until trial. *Boit*, 976 F.2d at 676-77.

Endeavoring to make the required prima facie showing, the plaintiff makes allegations but produces no evidence. She points out that the purpose of the loan was to fund a Maine business, that "[i]t is alleged that Mr. Constantin has held [sic] a plan to acquire the Merlin assets for his own cable TV business," and that Martinez submitted "fraudulent affidavits and signed pleadings" in the Maine state court proceeding. *See* Plaintiff's Memorandum in Response to Defendants' Motions to Dismiss, to Strike, for Change of Venue and for Judicial Notice (Docket No. 24) at 18-19. The fraudulent affidavits and signed pleadings themselves are not in evidence. She further avers as "obvious from the documents furnished to the Court by [Phoenix Leasing] . . . [that] Mr. Constantin and Mr. Martinez have initiated lawsuits from one end of the United States to the other in order to collect related loans from [the plaintiff's] business." *Id*. at 19. Finally, she asserts that Phoenix Leasing and its affiliates "have made efforts to acquire almost every communications system owned or controlled by [the plaintiff]. It is alleged in the Complaint that this effort has been orchestrated by Mr. Constantin and implemented by Mr. Martinez." *Id*. at 19-20.

The requirement of a prima facie showing "is a useful means of screening out cases in which personal jurisdiction is obviously lacking." *Foster-Miller*, 46 F.3d at 145. This is just such a case; to find personal jurisdiction over Constantin and Martinez here would run directly afoul of the requirement that the plaintiff produce something more than the unsupported allegations in her pleadings.

V. Res Judicata

Phoenix Leasing's effort to dismiss the complaint relies primarily on the doctrines of res judicata (i.e., claim preclusion) and collateral estoppel (i.e., issue preclusion).[6]

"Under the federal law of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were raised or could have been raised in that action." *Apparel Art Int'l, Inc. v. Amertex Enters., Ltd.*, 48 F.3d 576, 583 (1st Cir. 1995) (footnote omitted). "For a claim to be precluded, the following elements must be present: 1) a final judgment on the merits in an earlier suit; 2) sufficient identicality between the causes of action asserted in the earlier and later suits; and 3) sufficient identicality between the parties in the two suits." *Id.*; *see also Irving Pulp & Paper Ltd. v. Kelly*, 654 A.2d 416, 418 (Me. 1995) (to same effect, stating Maine law). To advance its res judicata argument, Phoenix Leasing relies on a judgment entered by the Maine Superior Court.

Maine law governs the extent to which this court should accord res judicata effect to a judgment of a state court in this forum. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481-82 (1982). The Maine state court proceeding at issue, *Phoenix Leasing, Inc. v. Merlin Cable Partners*, No. CV-91-343, was an action in which Phoenix Leasing alleged the breach of the same loan agreement and related guarantees that form the basis of the instant action. Merlin Cable Partners and Community Cable Services filed an answer asserting the alleged usuriousness of the loan as an affirmative defense; they also filed a counterclaim. The proceedings were subsequently stayed as to Merlin Cable as a result of its bankruptcy filing. However, in October 1991 the state court dismissed Community Cable's counterclaim with prejudice, and in March 1992 defaulted Community Cable

[6] The plaintiff contends that Phoenix Leasing waived any right to assert res judicata here by consenting in the bankruptcy court to the assignment to the plaintiff of any claims against Phoenix Leasing held by Merlin Cable. The plaintiff cites no authority for this proposition and I agree with Phoenix Leasing that it should be rejected.

(as the result of certain discovery violations), thereafter granting summary judgment to Phoenix Leasing on the issue of damages. In Maine, "[a] judgment by default is just as conclusive on the rights of the parties as a judgment on a demurrer or verdict." *Irving Pulp & Paper*, 654 A.2d at 418 (citation omitted).

I conclude that the state court judgment meets the res judicata tests articulated by both the First Circuit and the Law Court and therefore the plaintiff is barred from litigating the claims she presents here. The First Circuit has described a "transactional approach" for identifying the claims or causes of action that were adjudicated for res judicata purposes. *Apparel Art Int'l*, 48 F.3d at 583.

> Under this approach, a cause of action is defined as a set of facts which can be characterized as a single transaction or a series of related transactions. The cause of action, therefore, is a transaction that is identified by a common nucleus of operative facts. Although a set of facts may give rise to multiple counts based on different legal theories, if the facts form a common nucleus that is identifiable as a transaction or series of related transactions, then those facts represent one cause of action.

Id. at 583-84; *see also Irving Pulp & Paper*, 654 A.2d at 418 (defining cause of action as "the aggregate of connected operative facts that can be handled together conveniently for purposes of trial") (citation omitted). The instant proceeding and the Maine state court action unmistakably spring from a common nucleus of operative facts, i.e., the loan transaction between Phoenix Leasing and Merlin Cable, and the former's subsequent efforts to enforce its rights pursuant to the loan agreement.[7] I also conclude that sufficient privity exists to bind the plaintiff here by the judgment

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[7] Phoenix Leasing also cites a District of Nevada proceeding in its discussion of res judicata, although it is not clear whether Phoenix Leasing contends that any judgment entered there is res judicata as to the present litigation. The preclusive effect of a prior federal court's judgment is purely a question of federal law. *Apparel Art Int'l*, 48 F.2d at 582. At issue in the District of Nevada action, *Phoenix Leasing, Inc. v. Sure Broadcasting, Inc.*, No. CV-N-91-185ECR, was a loan transaction between Phoenix Leasing and Sure Broadcasting, of which the plaintiff here was president. Sure Broadcasting filed a counterclaim, also naming as counterclaim plaintiffs Susan Lundborg, Merlin Cable Partners and Community Cable Services, *inter alia*. The counterclaim (continued...)

entered in the state court. As the sole shareholder of Community Cable Services, the plaintiff was in a position to exert effective control over the previous litigation, and does not contend here that she lacked such control. Since the court may infer such control from circumstantial evidence, I find that Phoenix Leasing has carried its burden of persuasion on that point. *See Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 759 (1st Cir. 1994); *In re Belmont Realty Corp.*, 11 F.3d 1092, 1097 (1st Cir. 1993).

Phoenix Leasing further points to judgments entered in a New York state court and in the Bankruptcy Court for the District of Maine and contends that the plaintiff is collaterally estopped from claiming here that Phoenix Leasing had no rights to enforce the Merlin Cable loan and that Phoenix Leasing had committed fraud by seeking to enforce Merlin Cable's obligations pursuant to that loan. Collateral estoppel, also known as issue preclusion, is more properly viewed as a branch of res judicata rather than distinct from it. *See Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 30 (1st Cir. 1994). Accordingly, as I noted above, state law governs the preclusive effect to be given state court judgments and federal law governs the effect of the judgments of federal tribunals. Collateral estoppel bars the relitigation of any factual or legal issue that was actually decided in previous litigation between the parties regardless of the actual claim involved in the previous

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[7](...continued)
alleged that the loan transaction between Phoenix Leasing and Sure Broadcasting was actually one of three related transactions, the first of which was the Merlin Cable loan at issue here. On motion of Phoenix Leasing, the court dismissed all but Sure Broadcasting as counterclaim plaintiffs on the ground that the other parties lacked standing, and subsequently entered summary judgment in favor of Phoenix Leasing. The court thereby confined the issues in that case to those relating to the Sure Broadcasting loan, which is not at issue in the instant case. While the Merlin Cable loan and the Sure Broadcasting loan may spring from the same nucleus of operative facts, I am unable to conclude on the present record that sufficient privity exists between Sure Broadcasting and the plaintiff here to accord the District of Nevada judgments any preclusive effect.

litigation. *Id*., citing *Restatement (Second) of Judgments*, § 27 (1982) (hereinafter "*Restatement*"). When it is established that the previous litigation in question involved the same parties,

> (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and binding final judgment; and (4) the determination of the issue must have been essential to the judgment.

Grella, 42 F.3d at 30.

On June 27, 1994 the Supreme Court of the State of New York, Suffolk County, entered an order in *Phoenix Leasing, Inc. v. Susan Lundborg*, No. 91-08094, denying Lundborg's motion to vacate a judgment of foreclosure against her on the ground that Phoenix Leasing lacked standing to pursue such a remedy (having assigned the underlying promissory notes). At issue was the same loan transaction that underlies the present litigation. The New York court determined that Lundborg had failed to sustain her burden of persuasion, despite having presented that court with the same Martinez deposition testimony to which she refers in her instant complaint.[8] On January 5 of this year, the U.S. Bankruptcy Court for the District of Maine entered an order in the Merlin Cable bankruptcy proceeding denying Lundborg's motion seeking reconsideration of that court's allowance of Phoenix Leasing's claim against the bankruptcy estate.[9] In so doing, the bankruptcy court rejected Lundborg's contention that Phoenix Leasing's claim was fraudulent and that Phoenix Leasing had misrepresented to the court that it was entitled to enforce the obligations of the Merlin Cable loan. Again, Lundborg invoked the Martinez deposition testimony.

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[8] The order of the New York court appears at Tab 7 of the materials submitted by Phoenix Leasing in connection with its request for judicial notice (Docket No. 7).

[9] The bankruptcy court's order appears at Tab 16 of the materials submitted by Phoenix Leasing. The Lundborg motion appears at Tab 15.

I conclude that these judgments collaterally estop the plaintiff from using the present proceeding to relitigate the issue of whether Phoenix Leasing committed fraud or otherwise relinquished its right to enforce the loan agreement because it assigned the promissory notes to the limited partnerships. Both the New York state court and the Maine bankruptcy court have already made a binding determination as to the allegation at the center of this lawsuit, i.e., that Phoenix Leasing and two of its employees did not knowingly and affirmatively perpetrate a fraud by representing to various tribunals that Merlin Cable was obligated to Phoenix Leasing pursuant to the loan agreement between the two entities. All of the plaintiff's claims depend on the contention that such a fraud took place.[10]

The plaintiff seeks to resist an adverse result on both claim and issue preclusion by invoking the equitable notion that a party may not claim the benefit of a judicial determination that was obtained fraudulently. She relies on sections 26 and 28(3) of the *Restatement*. Neither is applicable.

Section 26 provides in relevant part that a possible exception to the doctrine of res judicata exists when "[i]t is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as . . . the failure of the prior litigation to yield a coherent disposition of the controversy." *Restatement* § 26(1)(f) (1982). The defendant refers the court to the observation in the commentary to this section that "[a] defendant cannot justly object to being sued on a part of phase of a claim that the plaintiff failed to include in an earlier action because of the defendant's own fraud." *Id*. at comment j. Section 28(3) sets forth an exception to the doctrine of issue preclusion where "[a] new determination of the issue is warranted by differences

[10] The defendant also contends that collateral estoppel applies by virtue of the proceedings in the District of Nevada. As noted, *supra*, I am unable to conclude that sufficient privity exists between the plaintiff here and the defendant in that action so as to accord any preclusive effect to those proceedings.

in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them[.]" *Id*. at § 28(3). The plaintiff points the court to the commentary noting that, "[i]n an action in which an issue is litigated and determined, one party may conceal from the other information that would materially affect the outcome of the case." *Id*. at comment j. The drafters go on in their comment to note that

> the court in the second proceeding may conclude that issue preclusion should not apply because the party sought to be bound did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the first proceeding. Such a refusal to give the first judgment preclusive effect should not occur without a compelling showing of unfairness . . . . [D]iscretion to deny preclusive effect to a determination under the circumstances stated is central to the fair administration of preclusion doctrine.

Id.

Assuming that these *Restatement* principles describe the applicable law, I do not believe this case presents circumstances of the sort envisioned by the drafters in setting forth exceptions to the doctrine of res judicata. As the defendant notes, the New York state court, the Maine Bankruptcy Court and the Nevada District Court all considered the deposition testimony cited by the plaintiff and supposedly revealing that Phoenix Leasing was not the real lender. Therefore, it cannot be said that Phoenix Leasing obtained judgments in other courts by having concealed the information provided by Martinez. The only information presented here that has not been made available elsewhere is the identity of the limited partnerships to which Phoenix Leasing assigned its rights. This revelation hardly amounts to the exposure of fraud, and no exception to res judicata doctrine applies in these circumstances. *See, e.g., Harnett v. Billman*, 800 F.2d 1308, 1313 (4th Cir. 1986), *cert. denied*, 480 U.S. 932 (1987); *cf. County of Suffolk v. Long Island Lighting Co*., 710 F. Supp. 1387, 1393 (E.D. N.Y. 1989), *aff'd in part and rev'd in part on other grounds*, 907 F.2d 1295 (2d Cir. 1990). In any

event, an allegation that a party obtained a judgment by fraud should be addressed to the court that rendered the initial judgment. *See e.g., Russell v. SunAmerica Securities, Inc.*, 962 F.2d 1169, 1176-77 (5th Cir. 1992); *Restatement* § 78 (party should seek relief from court rendering original judgment "unless relief may be obtained more fully, conveniently, or appropriately by some other procedure").

Because I conclude that the plaintiff's claims are barred by both claim preclusion and issue preclusion, I need not address Phoenix Leasing's contention that it is entitled to dismissal because the complaint fails to state a claim for violation of California's usury statute.

VI. Conclusion

For the foregoing reasons, I recommend that the pending motions to dismiss the plaintiff's complaint be **GRANTED**, and accordingly that the complaint (as amended) be

dismissed as to defendants Phoenix Leasing, Inc., Gus Constantin and Gary Martinez.[11]

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 22nd day of June, 1995.

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David M. Cohen
United States Magistrate Judge

[11] This disposition, if accepted, moots the defendants' motions for a more definite statement, to strike certain allegations in the complaint as irrelevant or scandalous, and to change venue.

If the court adopts my recommended disposition, I futher recommend that the court require the plaintiff to advise the court by a date certain whether she intends to pursue any of her claims against newly added defendants Phoenix Leasing Cash Distribution Fund III and Phoenix Leasing Income Fund 1975 ALP. If the indication is that the plaintiff does intend to proceed against either of these limited partnerships, I propose to hold a status conference to explore related issues.